CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, MARCH TERM 181[illegible].

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MORGAN vs. *BELL.*

Morgan *vs.* Bell.

A consignee may sue for injury done to the goods.

The misbehaviour of the counsel or of the jury must be taken advantage of, by a motion for a new trial.

The court cannot allow interest on the sum awarded in the verdict, which was before unliquidated.

APPEAL from the court of the first district.

The plaintiff, as consignee of certain goods, brought the present action, to recover damages for injury done to them, by the ill management of the master. There was a verdict, and judgment for him, and the defendant appealed.

There was no statement of facts, but the defendant assigned errors. 1. That the suit ought to have been brought by the owner of the goods and not by the consignee.

2. That the plaintiff's counsel handed to the jury a formula, by which the verdict was rendered: they filling upon blanks left for the sums.

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3. That interest was given on the damages found, from the date of the petition.

4. That the jury took an improper rule to ascertain the damages, viz. adding to the costs at the port of shipment, the amount of insurance, freight, commission for the auctioneer and consignee, and deducting from the aggregate amount, the proceeds of the sale in this city.

Hennen for the plaintiff. This is an action to recover damages for the injury done to certain goods, consigned to the plaintiff, on board of the vessel commanded by the defendant: which injury the plaintiff alleges arose from the negligence and mismanagement of the defendant.

The general principle of law is, that *the master and owners are responsible for every injury that might have been prevented by human foresight or care. Abbott on ship. 270, 259. 1 Condey's Marshall, 241, 2, 3. 6 Johns. Rep. 177. 2 Brown's admiralty law, 144. 1 Emerigon 379, 377, 315. Pothier's traite &c. charte partie, no. 31. Domat, liv. 1, tit. 4, sect. 8 sect 4, and liv. 2, tit. 8, sect. 4, § 1. Justinian's digest, lib. 19, tit. 2, lib. 25. and Godfrey's comment thereon. 1 Pothier's Pandects Justinian code 539, Roccus, nos. 55, 69, 16.—*

The jury, who were the proper judges of the fact, have by their verdict established the default of the defendant in this respect. But it is objected that the consignee of these goods has no right of action in his own name; particularly as the bill of lading states, that the goods were "*for J. Hennen.*" It is an established rule, that an action against a carrier for the loss of goods, must in general, be brought in the name of the consignee, and not of the consignor. 1 *Chitty on pleading*, 3, the law implying the contract by the carrier, to have been made with the consignee, in whom the property of the goods was vested by the delivery to the carrier; and though the bill of lading, in this case, shews that the consignee is only a trustee, yet as the delivery is to be made to him, and as he has a beneficial interest in the performance of the contract for his commission, he may well maintain the action in his own name, and hold the sum recovered as trustee for the real owner. 1 *Chitty on pleading*, 4, 5. 1 *Livermore's law of Principal and agent*, 215, 25. 2 *Ventris* 310.

As to the objection that the court has allowed interest on the amount of the verdict of the jury, from the day of the judicial demand; it is

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sufficient to answer that a sum certain and ascertained was sued for; such a specific sum as could support the attachment that has been put upon the property of the defendant; and that the jury have found in favour of the plaintiff that precise sum: therefore according to our practice, interest was justly allowed by the court on that sum, for which the jury found the defendant was *in morâ*. *Just. digest, lib.* 22.—*tit.* 1, *l.* 35.

The other grounds taken by the defendant's counsel for averting this judgment are clearly not within the province of this court. They might have been good cause, if established, for a new trial, but at this period such objections are too late.

Livingston for the defendant. The bill of lading shews that the goods shipped on board of the defendant's vessel, were the property of *J. Hennen*; if any damage therefore happened to them by the negligence of the defendant, it is the owner only who is entitled to bring an action. On this principle, the assignee being considered as owner, has in general the right of action: but here the consignee appears from the bill of lading, to be merely a trustee; and therefore is not entitled to any action for damages done to the goods of the owner.

But independently of the objection to the form of action, the court below clearly erred in giving interest on the amount of damages found by the jury. The demand was unliquidated, until ascertained by verdict, and in all such cases no interest is ever allowed: for that would be to add to the verdict.

If the court is satisfied, from the inspection of the record, that the jury erred in their mode of calculating the damages, or that the formula of a verdict was handed them: surely then it is, not too late to remedy this injustice whenever discovered.

Martin, J. delivered the opinion of the court.

I. The consignee of goods has, in our opinion, such interest in them as authorises him to sue for them, if they be withheld in whole or in part, or if they be injured. In the latter case there is a failure on the delivery, according to the bill of lading.

II. We think that any misconduct of the counsel or of the jury, especially of the kind complained of, ought be taken advantage of by a motion for a new trial: otherwise, in a case like the present, it will be presumed that the formula was given with the knowlege and consent of the other party: the only evidence of the fact being

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the presence of the formula, among the papers of the suit, in the handwriting of the counsel.

III. We are of opinion that the court erred in allowing interest upon the sum awarded in damages by the jury, from the date of the petition.

IV. The rule said to have been taken by the jury to assess the damages, we could not consider as an improper one. If they believed that at the time goods imported into this country from England were worth costs and charges, they acted correctly, and nothing appears to induce us to think that the case required a resort to any other rule: but if it were otherwise the remedy was by a motion for a new trial.

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed: and it is ordered that there be judgment for the plaintiff for the sum of 4261 dollars 91 cents, awarded by the jury and costs, and that the plaintiff and appellee pay the costs of this appeal.

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BATON vs. MOLLERE & AL.

Baton
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A fraudulent conveyance gives no title to a party to the fraud.

A witness who has been examined by one of the parties, may be re-examined by the other.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. This case comes up on several bills of exceptions. The plaintiff and appellee claimed damages from the appellants for a trespass alleged to have been committed by them in forcibly taking and conveying away from the plantation of one Anthony Maxent, a negro woman and her children, the property of the plaintiff, and so ill treating the woman that she died.

The present appeal is taken from a second trial of the cause, which was before this court on a former occasion, on a bill of exceptions to the opinion of the district court, in rejecting some evidence offered by the plaintiff, whereupon the cause was remanded with directions to admit the evidence, which has been accordingly done. *Ante* 66.

We find, in the record of the proceedings, on the second trial, bills of exceptions taken by the defendants and appellants to the opinion of the district court. 1. In denying them the privilege of amending their answer, in such a manner as specially to plead fraud in the plaintiff, so as to

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defeat his title to the slaves. 2. In refusing to admit written and oral testimony: to prove collusion and fraud in an agreement between the plaintiff and Maxent, by which the former obtained a title to the slaves. 3. In refusing to receive as evidence the deposition of Maxent, taken at the instance of the defendants, because the witness had been examined on a commission taken by the plaintiff.

I. As we are of opinion that the judge erred in rejecting the testimony offered by the defendant, on the general issue, it becomes unnecessary to notice the opinion, in refusing to allow the amendment.

II. The plaintiff, in his petition, alleges property in himself in the slaves, and force and injury in the defendants, whereby he lost his property; the answer denies both these principal allegations and it was necessary that they should be proven to authorise a recovery in damages. The evidence of the title to the property in the plaintiff is a bill of sale made to him by a proper officer, who sold the slaves by virtue of an execution, in a suit of the plaintiff against Maxent, in whose possession the woman was at the time of the alleged trespass. In opposition to

this title and to resist the claim of damages, the defendants offered evidence below to prove that Maxent had purchased the slave from one of them: they also offered to shew by oral evidence that the whole transaction relating to the suit, judgment and execution between Maxent and Bayon, was feigned, fraudulent and done with the view of defeating the just claims and rights of creditors, of whom L. Mollere, sen. states himself to be one by judgment, and having a privilege on the property in dispute as vendor to Maxent. The plaintiff has no just claim to damages for the loss of the slave, to the full extent of his value, unless he makes out a clear title in himself. It is true that the sale and delivery to Maxent gives the complete ownership of the thing sold, which he might have passed to any other person, by a fair and honest sale, or a legal conveyance, subject however, to all liens on it arising from contracts or the operation of the law. But a feigned and fraudulent alienation of property can give no title to one who is a party to such fiction and fraud, against the rights of third persons. Yet, admitting the title of the plaintiff and appellee, under all the circumstances of the case to be good, as against the appellants, still the evidence offered by them in the district court might, in our opinion, have

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been properly received in mitigation of damages, and we think the judge erred in rejecting it.

III. We are also of opinion that there is error in the opinion in the district court, in refusing to suffer the deposition of Maxent, legally taken, on the part of the appellants to be read in evidence to the jury. The circumstance of the witness having been previously examined in the cause, at the instance of the plaintiff and appellee, is not a good reason, why he should not have been again examined by the appellants, if no other legal impediment existed.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed, and that the cause be sent back to be tried anew, with directions to the court to admit oral or other legal evidence to prove the fiction and fraud, in the transactions between the plaintiff and appellee and Maxent, by virtue of which the former claims title to the slaves the subjects of the present suit, and also, to admit the deposition of Maxent, taken on the part of the defendants and appellants, if it has been regularly received.

Morel for the plaintiff, *Eustis* for the defendants.

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MEEKER'S ASS. vs. WILLIAMSON & AL. SYN'DICS.

MEEKER'S ASS. vs. WILLIAMSON & AL. SYNDICS.

Whether the recourse of nullity against a final judgment as it prevailed under the Spanish government, be still a part of the judiciary system of this state?

On the eve of bankruptcy, a debtor cannot convey to one of his creditors real property, in discharge of a claim for which the creditor has a lien thereon.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The first step, in the investigation of this cause, is to ascertain the nature of the action. The petition states that the plaintiffs, being owners of a certain house, agreed with Williamson, one of the bankrupts, whose rights are here represented by the defendants, that he should occupy it as their tenant; that Williamson, not having paid them any rent for it, was required to quit the premises, but refused so to do. It concludes by praying that Williamson may be decreed to deliver up the possession of the house and pay damages for the detention. The present defendants in their answer deny these facts and dispute the validity of the plaintiffs' title.

It is insisted by the plaintiffs that this is a possessory action, and that they have a right to be restored to their possession, independently of any inquiry into their title: but, as they have adduced no other proof of that possession, than a bill of sale of the premises to them, it is impossible to pronounce on the question of possession, with-

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out examining whether the bill of sale, be such as they could possess under.

In mere actions *recuperandæ possessionis* the fact of possession alone is at issue.—The plaintiff, proving that he was in possession, and ousted by violence, fraud or artifice, becomes entitled to recover possession at once; the other party, not being even permitted to say that the plaintiff has no title to the thing. But when the plaintiff puts at issue his right of possessing, as where he alleges that he is the owner, and presents his title, as the evidence of his possession, the *simple fact* of possessing is no longer the *only question*. The defendant is then allowed to dispute the validity of that title, and is maintained in the actual enjoyment of the premises, if the plaintiff fails to make his title good. *Greg. Lopez on Part.* 3, 3, 7, *and Gomez in leg. Tauri* 45, *n.* 118.

But, it is alleged by the plaintiffs that the defendants have no character to dispute their title inasmuch as they are the representatives of the creditors of Williamson and Patton alone and not of Meeker, Williamson and Patton, in whom it is said the right of property, in the house in contest, was vested jointly, previous to the sale made to the plaintiffs. It is not easy

to understand, how the interests of Meeker, Williamson and Patton, can be distinguished here from those of Williamson and Patton: nor how the creditors mentioned on the schedule of Meeker, Williamson and Patton, can be considered as the creditors of Williamson and Patton alone. But, could that distinction be made, still the creditors of Williamson and Patton would be proper parties to plead fraud against the sale of property in which their insolvent debtor had an interest.

The validity of the sale by virtue of which the plaintiffs aver that they were in possession, is therefore the true question to be inquired into.

It is contended by the defendants that this sale is void on two grounds: 1. Because made in part payment of a judgment which is null. 2. Because intended to give an undue preference to a creditor, on the eve of bankruptcy.

1. The first objection, that of the nullity of the judgment, by which the claim of the plaintiffs has been settled, presents a question of vast importance, viz. whether the remedy granted by the Spanish laws, under the name of recourse of nullity, against final judgments, not appealed from, be still a part of our judiciary

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system. Independently of the right of appeal, there existed, in Spanish tribunals, other remedies, among which was the recourse of nullity, which could be resorted to, when the judgment was manifestly against law, or egregiously unjust—that remedy was to be used in the court where judgment had been rendered, if no appeal had been claimed, or if the appeal contained the express reservation that the question of nullity should be decided below. Otherwise it went up before the appellate court, together with the appeal. The time within which this remedy could be applied for depended on the cause of the nullity. If the nullity was owing to a defect in the substantial part of the proceedings, such as a want of citation of the party, the time was thought by some to be unlimited: if to a defect of less magnitude, it was confined to sixty days: again, if it was not prayed for by action, but pleaded by way of exception, it was never too late, unless the exception relied on, could have been brought, under the shape of an action within the legal delay. We are inclined to believe that the law which created our courts, defined their powers, prescribed the manner of proceeding before them, established their different degrees of jurisdiction and fixed their relative situation, have

impliedly abolished such of the former proceedings as do not fall within the course of our present mode of obtaining redress by suit, and that the recourse of nullity is one of those. The subject, however, admitting of doubt, and the judgment in this cause, not being dependent on the decision of this question, we think it best to leave it open for future investigation.

II. The question which now remains to be be determined, is one, to which much of the reasoning formerly used in the case of *Brown* vs. *Kenner & al.* 3 *Martin*, 270, may be applied. The striking features of both cases are the same. The difference lies in this—that in the present case, it is not a security given, at the time of a bankruptcy, to a favoured creditor, who had no privilege, but a complete transfer of property made in payment of a privileged debt. It is contended on the part of the purchaser that the law, which recognises as valid, the payments made at any time previous to the bankruptcy, is applicable to this case: but a line ought certainly to be drawn between those payments which the debtor has made, in the usual course of his business, and the transfer of his property to creditors whom he is unable to pay, in the manner agreed upon and understood by the parties. In

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the first case, as was formerly observed, "nothing attends the transaction, which can have "any tendency to excite suspicions of fraud "and injustice:" in the latter it is the reverse. A favoured creditor, aware of the insolvency of his debtor, conspires with him to appropriate to himself the property, which the law already considers as the stock of all the creditors: and, in fact, admit such a contract, at such a time, to be binding, what becomes of those wise and equitable provisions, which are intended to secure to creditors an equal share in the estate of the insolvent? It is indeed forbidden to the debtor to give an undue preference to a creditor by mortgaging his property to him on the eve of a bankruptcy; but that provision will be a mockery, if instead of mortgaging, he be permitted to transfer the property itself.

In this case, however, it is said that no undue preference has been given; the creditor was a privileged one: he had a judicial mortgage on the property in contest for a sum far exceeding its value.

There is no doubt that this circumstance gives a much fairer aspect to the transaction, than it would otherwise have had; but if it would be unlawful for the debtor about to fail,

to make any change in the state of his affairs to the advantage of part of his creditors and the injury of the others, why should he be allowed to make one the proprietor of his estate, who had only a lien on it? Why should he be permitted to remove his property out of the reach of his creditors, who may be the losers by the change? It can hardly be supposed, in this case, that the house would have brought more than the amount of the claim of the plaintiffs, but it might have sold for more than they gave for it. Perhaps there were also creditors with a higher privilege than theirs: at any rate, if they had appeared as mortgage creditors, instead of owners, their privilege might have been contested. But, it is not for this court to take any such circumstances into consideration: if the sale be illegal, we are bound to declare it so, and to leave the parties to examine their respective rights, against the estate of the bankrupts, according to the course prescribed in such case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed, and that judgment be entered for the defendants and appellants, with costs.

Smith for the plaintiffs, *Livingston* for the defendants.

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AMORY & AL. vs. GRIEVE'S SYNDICS.

If A employs B to purchase bills, and B procures them on his own credit from C, and delivers them to A, who credits him therewith: on the failure of B, C will have no action against A, if there be no fraud or collusion on his part.

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APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellants claim a sum of money, mentioned in the petition, as creditors of the insolvent, for several bills of exchange sold or delivered to his use. The district court dismissed this suit and they appealed.

The facts of the case are to be ascertained from a statement made by the counsel, which refers to the deposition of a single witness, in whose deposition, from some cause not easily discoverable (perhaps from error in taking it down or copying it) expressions are to be found not easily reconcileable with each other.

It commences by stating that Grieve requested the house of F. and H. Amelung to purchase for him bills of exchange, on several houses in the northern states, and designated the house of the plaintiffs, as one of those who had such bills for sale. In consequence of which F. and H. Amelung bought bills from the plaintiffs and from other houses also designated to them by Grieve, to whom they delivered the bills, and received from him paper, of which they dispo-

ed. There was a particular account of these transactions kept between Grieve and F. and H. Amelung, in which he was debited with the bills they delivered to him and credited with the paper which he gave in payment. In another part of the deposition, it is stated that F. & H. Amelung credited Grieve, with the paper which he delivered to him and debited him with those which they gave in payment of the bills.

This deposition being the principal and almost the only evidence in the cause, this court is bound to weigh it, and as far as possible to deduce the truth from it. From the whole of it taken together, we believe the facts are established that the bills were purchased by F. & H. Amelung, on their own account, and credited to Grieve at his request, on his promise to refund to them their advance.

The statement of the counsel further shews that amongst other paper given by F. & H. Amelung in payment to the plaintiffs for the bills were several notes on which Grieve was liable either as maker or indorser, and for which the plaintiffs have been allowed a dividend of his estate. It is also agreed that the bills then sold by the plaintiffs have been paid.

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On these facts, we conclude that no contract ever existed between the plaintiffs and Grieve. F. & H. Amelung did not represent him, in the purchase of the bills, but purchased them on their own account, and afterwards sold them to him, as they might have done to any other.

In the pleadings, no combination to defraud the plaintiffs is any where alleged against the parties concerned in this transaction. Payment from the estate of Grieve, as on a contract, is not strongly insisted on by the counsel of the plaintiffs, who rely more, for the support of their claim, on the broad principles of justice and equity, on account of the estate of the insolvent having been increased from the funds of their clients, who have received no retribution therefore. How far such general and indefinite principles of justice and equity could, in any case, be applied to in deciding on the contracts and negociations of men, is very doubtful: but we are clearly of opinion, that they can have no application in the present.

Grieve has either paid F. & H. Amelung on his contract with them for the bills of exchange, or he is bound to do it, and his estate is still liable. Now, it appears to this court, that there is no principle of law, equity or jus-

tice that may authorise a decision in favor of the plaintiffs against the estate of Grieve, without any contract, whilst it may be liable on an express agreement between him and F. and H. Amelung to account to them for the same sum, which, for aught that appears on the record, may have been already paid to them. If all persons concerned in this transaction had been brought into court, and the whole subject completely developed, it is possible that the relief claimed by the plaintiffs and appellants might have been granted. As the case now stands, we are of opinion that the district court did not err.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed, with costs.

Livingston for the plaintiffs, *Moreau* for the defendants.

JONES vs. *GALE'S CURATRIX.*

The signatures & official capacities of the Spanish governors in Louisiana are matter of public notoriety, and the court will officially take notice of them.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. The plaintiff claims, under a judgment rendered under the Spanish government, the price of

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a slave of his sold to Gale, and it is averred that sufficient assets came to the hands of the defendant. The answer denies all the facts as well as the existence of the record, and avers that the debt, if it ever existed, was destroyed by a novation: farther, that the petitioner's husband mortgaged the slave, to one M'Murray, who now holds him, which is averred to be with knowlege of the plaintiff and assets are denied.

On this there was a verdict for the plaintiff for $320 principal, and $289 68. for interest. The defendant appealed.

The case comes upon a bill of exceptions and statement of facts.

The bill shews that, at the trial, the plaintiff offered in evidence a paper purporting to be the copy of a bill of sale, made by Charles de Grandpre governor of Baton-Rouge, signed Delassus, without its being otherwise authenticated than by being pinned to a paper called a record, in such a form, as records were kept by Spanish commandants, taken from the archives of the district of New-Feliciana, delivered to the convention and governor, by the Spanish authorities, and by the convention to the parish judge, now brought on a *subpœna duces tecum*.

that the defendant opposed the reading of the document, on the ground of its wanting certainty and authenticity as the authority of Delassus to make the copy did not appear—that, admitting his authority, there was no evidence of his having made or subscribed the copy. The district court overruled these objections and the papers was read.

The statement of facts informs us that the death of Gale, and the appointment of the defendant as curatrix were admitted—that the plaintiff offered in evidence the copy of the bill of sale, spoken of in the bill of exceptions and the record of the suit, in the Spanish court.

This court is of opinion that the district judge did not err, in admitting as evidence the document brought up by the parish judge, taken from the records officially delivered to him by the late convention, to whom they had been surrendered by the officers of the Spanish government. The signatures of Grandpre and Delassus, successively governors of the district of Baton-Rouge, on instruments deposited in the archives, are of the public notoriety as well their official capacities. *Hayes* vs. *Berwick*, 2 *Martin*, 138. The records, altho' loosely kept are admitted to

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be as all the records, in the office from which they are brought, are to be found.

On the merits we are of opinion that the debt is sufficiently proven, that there is no evidence to support any part of the defence, and that the plaintiff is entitled to the judgment out of the estate of Gales. But the petition has averred, and the answer denied the existence of assets in the hands of the curatrix. This fact was one of the issues submitted to the jury and they found a general verdict for the plaintiff. There was no evidence before them from which the existence of assets could be inferred. The verdict was, in this respect, unsupported by evidence, and the judgment given thereon consequently erroneous.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed, and this court proceeding to give such judgment as in their opinion ought to have been given in the district court, upon the statement which comes up with the record: It is ordered, adjudged and decreed that the plaintiff do recover the sum of $239 of principal and $239 of interest, out of the estate of the deceased and

costs in the district court, and that he pay the costs in this court.

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Duncan for the plaintiff, *Moreau* for the defendant.

COOLEY vs. LAWRENCE.

Appeal from the court of the parish and city of New-Orleans.

MATHEWS, J. delivered the opinion of this court. This case comes upon several bill of exceptions, and an agreement of counsel, by which the facts are to be ascertained. As the record contains sufficient matter to enable the court to give judgment on the merits, it is thought unnecessary to notice the bills of exceptions.

The defendant and appellee is sued as surety of J. Jarreau, who is a debtor to the plaintiff in $12,748 25, the price of three negroes, purchased from him as appears by promissory notes, bearing date of the 17th and 20th of January 1806, for the purchase money, payable in March 1808.

When the contract was entered into the plaintiff, principal debtor and defendant resided in the parish of Pointe Coupee, but previous to the

If a man puts his name on the back of a note not negociable, the presumption is that he meant thereby to become surety for the maker.

In such a case, his liability does not depend on the fulfilment of the formalities by which the indorser of a negociable paper becomes liable and The payor may recover from such a surety altho' he may have neglected to sue the principal debtor, or thro' negligence suffered some advantage to be lost, whereby the surety is placed in a worse situation.

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notes becoming due, viz. in August or September, 1816, Jarreau, the principal debtor, being about to remove out of the parish, the plaintiff requested some security for the payment of the notes, and the defendant, at the request of the debtor, indorsed his name on each of the notes. The indorsements being in blank, and not in the regular customary mode of transferring negotiable paper among merchants, it became necessary to resort to other evidence, besides that contained in the written instruments, in order to discover what species of obligation the defendant intended to bring himself under to the payee.

The testimony of Petion, the witness in this cause, together with all the circumstances which attended the transaction, as exhibited in the record, shews clearly, that the indorsements made by the defendant and appellee were intended to secure the payment of the notes, when they should become due.

One of these notes not being drawn in negociable form, and the indorsement in all being irregular, we are of opinion, that they cannot be of those which are to be governed by the rules and regulations peculiarly applicable to the transfer of bills of exchange and other negociable paper, which pass from an individual to another in a regular course of trade.

From the laws of France, as cited by the counsel of the defendant and appellee, it seems that an indorsement, similar to those now under consideration, would in that country, create a mercantile contract denominated an *aval*, which would be subject to the rules which govern cases of ordinary indorsements. But these laws cannot be applied to contracts made in this country, and it is agreed that no similar rule is to be found in our laws relating to commerce.

The defence of the appellee, so far as it is founded on the negligence of the plaintiff, in not having the notes protested for non-payment, and failure to give notice, as in regular mercantile transactions of this nature is not supported; because the obligations of the parties must be ascertained by the principle of law, which is given in ordinary cases of suretiship.

Jarreau, having already been prosecuted to insolvency, in an action commenced by the plaintiff, no question can arise, with regard to the discussion of his property. The only one which can arise in the case is whether the surety ought to be exonerated from the payment of the note, in consequence of the creditor, not having prosecuted the principal debtor in a reasonable time, if by such a negligence, he has destroyed or lessened any of the rights or privileges, which

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the surety ought have been subrogated to, on being compelled to pay for the debtor.

The notes became due in March 1808, and it does not appear that the plaintiff sued Jarreau till 1811—an indulgence of three years. Believing, as we do from the evidence in the case, that the defendant in putting his name on the back of the notes, intended to contract towards the payee an ordinary obligation of suretiship, it is unnecessary to enquire what would be the effect of a delay on the part of the creditor to pursue the principal debtor, in a case where the surety contracts a special obligation to pay for the debtor, if he should be unable to make payment. It is a general principle of law, that no person against his will can be compelled to sue another, and our code gives the surety the right of suing the principal debtor for indemnification, when the debt is due by the expiration of the term for which it had been contracted. *Civ. Code*, 430. *art.* 18. The surety, having this right of action in himself, cannot justly claim an exoneration from his obligation, as a consequence of the delay of the creditor to sue, unless this negligence on his part can be considered such a conduct on his part, as will amount to an act whereby the subrogation of his rights, mortgages and privileges, can no longer operate in fa-

vour of the surety. The question is reduced simply to this: is the defendant and appellee entitled to the benefit of the action *cedendarum actionum?* And perhaps, if he intended to take advantage of this, he ought to have entitled himself thereto by plea.

As this question appears to have been justly settled by Pothier, we think it proper here to introduce the author's own reasoning: "when the creditor has allowed some right of hypothecation on the goods of his debtor to be lost, either by omitting to oppose the adjudication of the property in favor of other persons, or by suffering persons purchasing without the charge of hypothecation, to acquire a liberation from it by a possession of ten or twenty years, can the co-debtors *in solido* and sureties oppose the exception *cedendarum actionum,* upon the ground that he has disabled himself from ceding to them his hypothecary action, which he has suffered to be lost, and upon which they had relied for recourse, in case they should be compelled to pay the whole? I do not think that they can; the exception *cedendarum actionum,* as it appears to me, ought not to be opposed to the creditor, unless by a positive act, on his part, he has rendered himself incapable of ceding his actions against one of the debtors by discharging his

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person or property, or unless by allowing a demand, which he has instituted to be dismissed, he has laid himself open to the suspicion of collusion. But a mere negligence on his part, in not interrupting the possession of purchasers, or in not opposing the adjudication to other creditors, ought not to subject him to the imputation: because he is only subjected to the cession of his actions, by a mere principle of equity, not having contracted any precise obligation to the other debtors and sureties to preserve them: it is sufficient that he act with good faith: that is, that he do nothing contrary to his obligation and he ought not to be answerable for mere negligence." 2, *Pothier on obligations, n.* 520 *in fine.*

From this authority, it is evident that mere negligence on the part of the creditor, will not exonerate the surety, altho' thereby some privilege be lost to the latter. It does not appear that Lawrence himself ever used any diligence either by suing the principal debtor for indemnification, as he might have legally done, or at any time requiring the creditor, on payment to transfer to him the rights, actions and previleges which he possessed.

We think the parish court erred, in consider-

ing the contract, on which this action is founded as one recognised by the laws of France, under the name of *aval*, and in applying the rules established for the government of such contracts, in that country, to the present case.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed: and proceeding to give such a judgment as in our opinion the parish court ought to have given, it is ordered, adjudged and decreed that the plaintiff and appellant recover from the defendant and appellee the sum of $1348 24, with legal interest thereon, from the judicial demand and costs.

Smith for the plaintiff, *Denis* for the defendant.

GALE vs. *DAVIS' HEIRS.*

When a couple remove from the country, in which they were married, their respective rights to the property which they acquire in the country to

APPEAL from the court of the third district.

DERBIGNY, J. delivered the opinion of the court. The present suit was first instituted by the plaintiff and appellee and her husband, to recover certain slaves, which they said, were part of the estate left by Sarah Nicholson, of

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whom she is heir in part. The demand was afterwards amended so as to be made alternative, either for the whole property, or for so much of it as might be found to belong to the estate of Sarah Nicholson.

which they migrate, are to be regulated by its laws.

The material facts in the case are the following:

Sarah Jones, the ancestor of the appellee, was married in North Carolina to James Nicholson, in the year 1769. She was then possessed of a negro slave, named Hannah. Nicholson and his wife emigrated shortly after, to the then British province of West Florida, where they remained until the year 1778, at which time they came to settle in the island of Orleans, within the Spanish dominions, where the wife died. At her death, an inventory of the joint estate of her and her husband was made by order of the Spanish government, at the request of the appellee's husband; but no partition took place between the surviving partner and the heirs of his wife. He was left in possession of the whole estate, and bound himself not to dispose of any part thereof, until the claims of the heirs of his wife should be established or rejected. A few years afterwards James Nicholson died, having by his will in-

stituted for his heirs the seven children of his brother Henry, and another nephew, in all eight heirs, among whom is Mary, widow Davis, one of the defendants. It appears that the estate of James Nicholson, including such slaves as might belong to the heirs of his wife, was divided by his own heirs, and that the slaves claimed in this suit fell to the share of Mary Davis. Of the six slaves mentioned in the petition, five, to wit: Jeffrey, Jeriah and her three children, are claimed as the offspring of Hannah.

The first question is whether Hannah the slave of Sarah Jones, continued to be her separate property after her marriage with James Nicholson? By the laws of North Carolina, where their marriage took place, the reverse must have been the case: there, the personal estate of the wife being vested in the husband, from the moment of the marriage, and slaves being considered as personal property. Hannah, instead of remaining the exclusive property of of Sarah Nicholson, passed under the dominion of her husband exclusively. In opposition to this, we have the repeated declarations of James Nicholson, who, before the death of his wife, frequently acknowleged in conversation that

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Hannah belonged to her. But a separate personal estate in the wife is a thing so foreign to the common law, that something more than Nicholson's acknowlegments was necessary to explain it. The claim therefore to Hannah and her progeniture, as the separate property of Sarah Nicholson, cannot be sustained. It seems, indeed, to have been relinquished, when upon a closer enquiry into the the rights of the plaintiff, it was thought prudent to amend the petition, so as to make it embrace a claim of part of the property, as acquired during the community of Nicholson and his wife.

Something has been said, on the part of the plaintiff, of a tacit mortgage, existing in her favour on the property which she claims. But that pretention, besides being incompatible with the present claim, is not founded in law. There exists no tacit mortgage in favour of the wife for the acquets and gains. *Curia Phil. tit. hypoteca, no.* 27,—and how could such a right exist? The title of the wife to one-half of the acquets and gains is that of an owner, not of a mortgagee: during the matrimony, that title is eventual; on its dissolution, it becomes complete on the property then existing. She has, by law, her choice betwen taking her share of the ac-

quets, and renouncing them: in the first case, she takes as owner; in the latter, all the acquets are left to the husband, and the wife then exercises her right of tacit mortgage for the recovery of her own particular property. But a claim of half the acquets by right of mortgage implies contradiction.

The demand therefore of the plaintiff, so far as it respects her share in the slaves here claimed, as part of the acquets and gains of which Sarah Nicholson may have died possessed, is the true subject of investigation in this case.

Sarah Nicholson married in a country to the laws of which no such thing is known as a community of acquets and gains between husband and wife. But though it was once a question, it seems now to be a settled principle, that when a married couple emigrate from the country where their marriage was contracted into another, the laws of which are different, the property, which they acquire in the place where they have moved, is governed by the laws of that place. *Huberus* cited in 3 *Dallas*, 370. *Greg. Lopez on part.* 4, 18, 24.

According to that rule, the community between Nicholson and his wife began in 1778,

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the epoch of their settlement within the Spanish dominions, and had lasted nineteen years when Sarah Nicholson died. Of the six negroes here claimed, Jeffrey was born and Dick was bought anterior to the community; Jeriah was born during it, and Jeriah's children after the death of the wife, as it appears from the inventory, where Jeriah is said to be eighteen years old, and where some of her children are mentioned. On the two first the plaintiff has, of course, a claim; in Jeriah there is as little doubt that she has an undivided interest; but as to Jeriah's children, the question is involved in some difficulty.

The first thing to ascertain is whether the demand, as it stands, reaches those children. The petition, as we understand it, prays judgment for the specific property, or its value, or so much of it as the interest of the plaintiff therein may amount to, by virtue of the community which did exist between Nicholson and his wife until her death, the expressions are: "that the petitioner may have judgment for the said negroes or their value with damages of detention, as the petitioner may be in equity and justice entitled to the same respectively, or in the community as held by the said Sarah and James Nicholson at the time of her death in 1797."

Whatever interpretation may be given to this demand, it is clear that it is not intended to extend further than the epoch of Sarah Nicholson's death, and that it does not even suggest a continuation of the community after that time. There if the present demand was for her share in the community generally up to that time, the plaintiff could recover nothing more than the acquets then accrued, because nothing can be allowed beyond the extent of the demand, *ultra petita.* But here the property acquired after the time limited by the demand is sued for as if it existed before that time. The plaintiff has mistaken the nature of her right; but the thing is demanded, and judgment may pass thereon. *See Feb. de Juicios, lib.* 3, *cap.* 1, *sect.* 13, *no.* 476—*Cur. philip. tit. Sentencia no.* 6.

A question of moment is now open for consideration. Does there exist in this country any such thing as a continuation of community between the heirs of the husband or wife, and the survivor, in certain cases; and is this such a case?

A continuation of the community generally, that is to say, an equal participation in the fruits produced by the estates, both of the hus-

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band and of the wife after the death of one of them, is said by the Spanish authors to take place in certain cases, between the survivor and the heirs of the deceased, if the survivor has remained in possession of the whole. Febrero, who has discussed the question at large, classes those cases under four heads:

The first is, when the parties contracting marriage have so stipulated it;

The second, when the parties live in a country where the law 6, tit. 4, book 3, of the Fuero Real, (the only one in the Spanish laws which speaks on that subject) is in actual use;

The third, when all the estate is composed of acquets and gains;

The fourth, when from a voluntary continuance in managing the estate in common, in living together at a common expence out of the common stock, and without settling accounts, the survivor and the heirs of the deceased, have evidenced an intention of remaining in partnership.

The present case does not seem to belong to any of those heads. No stipulation of the kind was ever made between the parties: the law of the Fuero Real above mentioned, is believed not to be in force in this country; the estate was not all composed of acquets and gains, for part of

the property inventoried belonged to the husband before the existence of the community; and as to the conduct of the parties, it shews the reverse of an intention to remain in partnership. No such thing, therefore, as a continuation of the community *generally* can have taken place here. But this case is one in which the survivor has kept possession of some property, one half of which belonged to the deceased. Has not the partnership subsisted as to that joint estate? Febrero answers in the affirmative, and his opinion is evidently founded on the soundest principles of justice. The moment that the husband or wife dies, the title to one half of the common property vests immediately in his or her heirs. They become joint owners of the whole together with the survivor. In that state of things, and until a division takes place, or until the title of the heirs is lost in some other way, which is believed not to have taken place here, it is difficult to conceive how the fruits of such property could be otherwise than common to both parties.

The children of Jeriah shall therefore be considered as the property of the joint owners of their mother; and this action as a demand for a division of the property.

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It is therefore, ordered, adjudged and decreed, that the judgment of the district court be reversed and annulled; and this court, proceeding to give such judgment as the said district court ought to have given, does adjudge, order and decree that the appellee shall recover one fourth part of the within mentioned slaves, to wit: Jeriah and her children Abraham, Nancy, and Judy; to which effect, if no partition in kind can be made amicably within two months, from the date hereof, they shall be sold at public sale, and one fourth of the proceeds shall be paid to the appellee; and it is further ordered that the appellee shall pay the costs of this appeal.

Moreau for the plaintiff, *Duncan* for the defendants.

DENIS vs. *CORDEVIELLE*.

Errors in law, apparent on the record, may be assigned, altho' there be neither statement of facts, special verdict or bill of exceptions.

APPEAL from the court of the parish and city of New-Orleans.

The attorney of absent heirs, appointed by court of probates to represent the absent heirs

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellee commenced this action, as attorney duly appointed by the

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of Opieces, deceased, against the defendant and appellant, who had been appointed curator of the estate, to enforce the payment into the treasury of the state of the sum of $2959 49, which had been determined, by the court of probates, to be due from the curator to the estate. A judgment was taken by default in the parish court, which was afterward made final.

the court of probates, may sue the curator of the estate, for a balance due by him without sueing him and his sureties on the bond.

In such an action the balance is not to be paid to the attorney of absent heirs, but deposited in the state treasury.

He has brought up the record unaccompanied by any bill of exceptions, a statement of facts or any thing equivalent thereto, and the appellee moves to have the appeal dismissed.

The appellant opposes the motion, attempting to shew errors apparent on the face of the record, which he alleges to be sufficient to authorise and require a reversal of the judgment.

It has been our practice to dismiss all appeals, where no statement of fact, special verdict or bill of exceptions comes up with the record unless in cases in which it appears evident that the appeal was taken for the sake of delay only, and justice required an affirmance of the judgment with damages.

The present is the first instance, in which an appellant has insisted on the right of making an assignment of errors in law, apparent on

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the record, unaided by a statement of facts, special verdict or bill of exceptions.

He claims this right under the 13th section of the act to organise the supreme court, 1813, which provides that "final judgments, in civil actions, in any of the district courts, where the matter in dispute exceeds three hundred dollars, exclusively of costs, shall be re-examined, reversed or affirmed in the supreme court; but there shall be no reversal for any error in fact, unless it be on a special verdict rendered in the district court, or on a statement of the facts agreed upon by the parties, or their counsel, or fixed by the court, if they disagree: which statement of facts may be made at any time before judgment, at the request of one of the parties."

The first part of this section expresses nothing more than is found in the constitution, which gives to this court appellate jurisdiction in civil cases, where the matter in dispute exceeds three hundred dollars. In the latter part the legislature seems to have intended to lay down a rule for the government of the court, in the exercise of its jurisdiction, very difficult to be understood, in consequence of the terms in which it is expressed. When the facts of a case are ascertained by a special verdict or a statement made by the parties, who it is supposed have the clear-

est knowlege of them, or by the judge, immediately after having them disclosed to him, according to the rules of evidence, it is really hard to conceive the possible existence of any error in fact: as, according to our ideas of judicial proceedings, a special verdict or such a statement are conclusive as to the correctness of the facts therein contained; and even should there be an error, this court has no means of correcting it. Perhaps it was the intention of the legislature, when they passed this part of the judiciary law, that all cases, brought before the supreme court by appeal, should come in such a manner as to enable the court to do complete justice between the parties, without the necessity of remanding them to the inferior tribunals: for we discover no provision for sending back to the courts of original jurisdiction, until after the passage of the supplementary law.

In this view of the subject, we are inclined to believe that the section, under consideration, was intended for nothing more than to ascertain and fix the mode by which the facts arising from the evidence of the cause, in the inferior court, are to be made known to the supreme court on an appeal, whenever a knowlege of them is necessary to enable the latter to correct the error

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of the former, whether they proceed from improper conclusions on facts or mistakes in law.

The right of the citizen to appeal from a judgment or decision of any inferior court of the state, by which he thinks himself exposed to suffer an irreparable injury, in all cases in which the matter in dispute exceeds three hundred dollars, is secured by the constitution and cannot be destroyed by any legislative act. It carries with it the power, and makes it the duty of the supreme court to correct the errors of inferior tribunals of the country. We are, therefore, of opinion that the appellant has a right in all cases of appeal to assign errors in law, apparent on the face of the record, even when the appeal is not accompanied by a special verdict, statement of facts or bill of exceptions, and it is our duty to examine and decide on such errors.

This suit having been commenced and prosecuted to judgment in the court below, and the appeal taken as above stated, the defendant and appellant contends, that there is error in the petition, in the proceedings and in the judgment of the parish court.

It is stated, that there are four causes of error in the petition. 1, The want of sufficient certainty in the description of the kind of curator-

ship, which the defendant undertook. 2, That the plaintiff, in the parish court, has not sufficiently set forth the judgment on which his action is grounded. 3, That the prayer of the petition is ill, inasmuch as the plaintiff prays that the money be paid to him, while the law requires it to be paid into the treasury of the state. 4. That an attorney of absent heirs, appointed under the 4th section of the act Feb. 21st 1809, has no right to bring any suit, on the judgment of a court of probates, but is to sue the curator and his sureties on their bond: the expressions of the law being to this effect.

I. As to the two first causes of errors, we are of opinion that the kind of curatorship, exercised by the defendant, is sufficiently explicit, he being described as the curator of the estate of Opeius deceased, which must mean the estate of a person, not, in this respect, represented by heirs in the state, and consequently such an estate as is known in our law by the appellation of a *vacant estate*.

II. The judgment of the court of probates, being merely the evidence in the suit, its not being set forth in the petition, is no cause of error.

III. As the attorney, appointed by virtue of the act above alluded to, it is presumed, does not give security, it is not safe that the money should pass into his hands. But, in the present case, the petition clearly points out the object and end of the suit, which is, that the amount due should be paid into the treasury of the state; that part of the prayer, which requires it to be paid to the attorney, may be rejected as surplusage, and consequently erroneous in point of form, and might and ought thus to have been viewed by the parish court and accordingly been corrected in its judgment and decree.

IV. As stated by the counsel for the appellant in his assignment of the fourth error, the expression of the law is "for the purpose of prosecuting both the administrator and his sureties" Here we see a power given to proceed against both; but it seems to us not to follow as a necessary consequence, that the attorney is bound to pursue them in the same action on their bond. For what good or rational purpose? The primary obligation is on the part of the curator to do certain things, and if he can be made to do them, without resorting to his sureties, we can see no good reason why they should be unnecessarily molested. Perhaps this regu-

lation would authorise a simultaneous prosecution against principal and sureties, without the necessity of a discussion of the property of the former, as in ordinary cases: but, we do not believe that there is any thing imperative in it to this effect. In the petition then there is nothing substantially erroneous and we are not authorised to revise the judgments of inferior courts on account of formal defects.

In relation to the error assigned in the proceedings of the court, it appears by comparing the date of the citation and judgment by default, that ten days had not elapsed, including the day of service, and excluding that on which the judgment was taken. This, altho' it may differ from the practice of courts of justice in some countries, is conformable to that of ours, and being not in violation of law, cannot be considered as erroneous.

Believing that the judgment of the district court is erroneous in decreeing the money to be paid to the attorney, who gives no security, instead of ordering it to be paid immediately into the treasury, it is useless to examine in any other cause of error in the judgment, as for this it must be annulled, avoided and reversed, which is accordingly ordered and decreed. And, pro-

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DAVIS vs. CHENAVILLAS.

ceeding to give here such a judgment as in our opinion ought to have been given in the court below, it is ordered, adjudged and decreed that the appellant, who was defendant in the parish court, do pay over and deposit, into the treasury of the state, the sum of two thousand nine hundred and fifty nine dollars and forty cents, with legal interest thereon from the 15th of September, 1815, within three days after receiving notice from the sheriff to that effect, and in default thereof, it is further ordered, adjudged and decreed that the said sum be levied by the sheriff aforesaid, upon the property of the appellant and defendant to be by him immediately deposited in the treasury of the state, according to the law in such cases made and provided, and it is further ordered, that the appellee pay the costs of this appeal.

The plaintiff *in propriâ personâ*, *Livingston* for the defendant.

ALLARD vs. *CANUSHAU.*

The holder of a negociable note, endorsed in blank, may sue thereon.

APPEAL from the court of the parish and city of New-Orleans.

When a judg-

MATHEWS, J. delivered the opinion of the

court. In this case the defendant suffered judgment to be obtained by default against him, in the parish court, which being afterwards made final, he appealed.

ment has been taken by default, for *want of an answer*, it may be made final without assigning reasons.

The record comes up without any statement of facts, or bill of exceptions, but it shews that the action was brought on a negociable note, indorsed in blank by the original payee, and several other blank indorsements appear after the first.

The appellant assigns as errors apparent on the record. 1. That the plaintiff does not appear to have any right of action: the title in the instrument on which the suit is brought not being in him. 2. That the instrument contradicts one of the material allegations in the petition. 3. That no evidence appears to have been introduced to prove the signature of the defendant, nor any of the indorsements. 4. That the judge did not adduce the reason on which the definitive judgment is grounded.

Bills of exchange and promissory notes made payable to the bearer pass by simple delivery, and a *bona fide* holder is entitled to them in full and absolute property. Where they are drawn payable to order, in countries where blank indorsements are permitted and customary among

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merchants, the blank indorsement of the original payee assimilates them to those payable to bearer, so far as to be transferable by delivery, and vests the holder with a right of action against all the preceding parties. *Chitty on bills*, 146, *Swift's evidence*, 309, *Douglas* 611.

The appellee is the fair holder of a negociable paper, indorsed in blank, which according to the custom of merchants in the United States gives him a right of action against all preceding indorsers: the first error assigned is therefore without foundation.

The holder of a note thus circumstanced has not only a right of action against all the preceeding parties to it collectively, but also separately, and he may chuse among them whom he will sue, and therefore the second error assigned is not supported.

The third assignment of error relates altogether to the evidence in the case, and as there is no bill of exceptions nor statement of facts, we are bound to conclude that every thing was properly done.

With regard to the fourth and last error assigned, we are of opinion that notwithstanding the expressions of the constitution in that respect seems to embrace every case, it would be absurd to apply the rule there laid down to cases where

in judgment is obtained by default. The manner in which such a judgment is to be entered is pointed out by law, the act of the legislative council for regulating the practice of the late superior court in civil cases, 1805, c. 26, and according to that law, if the court remains in session three days, after the judgment by default is taken and no motion be made to set the same aside, &c. then the said judgment shall be final, whenever the demand is liquidated by a note, &c. Now, by this law, it seems that no act of the court is required to render the judgment final whenever the sum is liquidated; it becomes so by the lapse of time. Surely, no reason can be required in support of a judgment in cases, wherein no activity or mental exertion is necessary on the part of the judge. From the tenor of the act alluded to, it appears evident that the legislature intended that in all cases of liquidated accounts or demands; when no answer is filed, the allegations in the petition should be taken *pro confesso*, and that the judgment rendered in consequence of the default of the defendant would become final, in consequence of his negligence and sufferance, without any agency of the court. Now, in the present case, the parish court has declared the judgment to be final and fixed its amount: yet, as this act was unnecessary in

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give it the force and validity of a final judgment, it ought not to be allowed by any irregularity in the manner of doing it (supposing such really to exist) to destroy the force and efficacy of that, which would have been good and valid, without such an interference of the court. The failure of the defendant to answer is given in this case as the reason of the judgment by default; which would have become final by the mere operation of the law and requires no reasoning on the part of the court.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Seghers for the plaintiff, *Moreau* for the defendant.

DELISLE vs. *GAINES.*

If the cause of action is stated to arise on the Bayou St. John, the defendant cannot succeed on the plea that it is not shewn to arise within the parish of New-Orleans.

An appeal will not be dis-

APPEAL from the court of the parish and city of New-Orleans.

The plaintiff commenced this action, in order to compel the defendant to account for and pay one moiety of the profits made by navigating a schooner the property of the plaintiff, of which the defendant was master, upon a contract by

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which it was agreed that the net proceeds of freight gained by the schooner should be equally divided between the owner and master.

The action was grounded on the original agreement between the parties. A promissory note given by the defendant to the plaintiff was given in evidence, which, as appeared by the record, had been regularly indorsed to one Alpuente. The indorsement, according to the evidence of the indorsee, was made for the sole purpose of enabling him to recover the amount of the note from the drawer, without any intention of transferring any interest to the indorsee, who being unable to collect any part of it, returned it to the plaintiff.

missed, because the authority of the person who signed it for the principal does not appear, on the record.

If a note be indorsed over, and the indorsee not being able to recover its amount, return it to his endorser, the latter will recover on it, altho' there be no re-endorsement.

Hennen for the defendant. The first point to be disposed of this case is a plea to the jurisdiction of the court. The parish court, in which the suit was instituted, is a court of limited jurisdiction, as clearly appears from the act of the legislature by which it was constituted, *Laws* 1813, 115, now it is a principle well established that, *in courts of a limited jurisdiction, the cause must appear on the record to be within the jurisdiction*, 9 *Mod.* 95, *Lord Canynsby's case. And the cause of action must be expressly alleged to have arisen within the jurisdiction of the court,*

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1 *Wash.* 84. Therefore, on the same principle, in actions brought in the circuit courts of the United States, which are courts of a limited jurisdiction, having cognizance only of some cases which are specially circumstanced, it is necessary to set forth on the record the facts or circumstances which give jurisdiction, and the omission of them will be error. 3 *Dall.* 382. *Bingham* vs. *Cabot*, 4 *Dall.* 7 *Turner* vs. *Enrille*. *Id.* 8, *Turner* vs. *Bank of North America*. *Id*, 13, *Mossman* vs. *Higginson*. 1 *Cran.* 343. *Abercrombie* vs. *Duplessis*. 2, *Cran*, 9, *Wood* vs. *Wagnon*. *Id*, 126, *Cashon* vs. *Van Noorden*, 2 *Cran*. 46, *Montrelet* vs. *Murray*. From these authorities which cannot be controverted, it clearly follows that the parish court had no jurisdiction on the case, as it is not alleged that the cause of action arose within its jurisdiction and the petition should consequently be dismissed.

The plaintiff has no right however to recover in this action, because he took a note for the amount of his claim and indorsed it over to a third person; and the bare possession of that note, without a re-indorsement of it to him cannot entitle him to recover on it.

The evidence moreover did not warrant the judge in giving judgment for the amount which he awarded.

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Ellery for the plaintiff. There is enough alleged in the petition, to shew that the cause of action arose within the jurisdiction of the parish court; for it is stated that the contract was made at the Bayou of St. John, which is known to be within the jurisdiction of the parish court; and under the liberal practice of our courts, this will answer the objection of the defendant.

The indorsee of the note was certainly a competent witness to prove for what purpose the note was indorsed to him by the plaintiff. He is not produced to establish any interest in him in his own favour, but to destroy all right to it in himself; and therefore must be the best witness that could be produced for that purpose, as he testifies against his own interest.

In actions of this kind when the defendant is called upon to render an account of a partnership concern and neglects to do it; the court should always be liberal in their allowances against him: it is in his power to shew where there is any incorrectness and if he does not, every thing is to be presumed against him. The evidence however warranted the court below in the judgment rendered.

There was no legal bond given for costs, the surety executed the bond for himself and the prin-

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BAKER.

cipal and there is no evidence on the record of this authority.

MATHEWS, J. delivered the opinion of the court. Two questions are raised for the consideration and determination of this court. 1. Under the circumstances of this case, is a redelivery of the note to the original payee, without any regular transfer by a new indorsement, sufficient to authorise the plaintiff to use it in the parish court as evidence of his claim against the defendant? 2. Is the evidence in the cause sufficient to authorise the judgment of the court to the full amount for which it was rendered?

I. It is insisted by the counsel of the appellant, that as the parish court is from its organisation, a court of limited jurisdiction, it cannot regularly take cognisance of cases, unless where the plaintiff brings himself within its jurisdiction, by alleging the cause of action to be such as appears to have been contemplated by the act of the legislature, which created that court and fixed the extent of its judicial powers.

II. The appellee's counsel farther shews, that security has not been given for the appeal, as the law requires, and therefore it ought to be dismissed.

Before we proceed to the examination of the merits of this case, these two preliminary objections must be disposed of.

As to the jurisdiction of the court of the parish and city of New-Orleans, it is expressed in the act of 1813, made to define the jurisdiction of that court, "that it shall consist of one judge, learned in the law, who shall have and exercise, within the limits of said parish, a jurisdiction concurrent with that of the first district, in all civil cases originating with the said parish." According to this definition and grant of power, it might be doubted whether that court could properly take cognisance of any case unless something is alleged in the petition, by which the plaintiff shews the cause of action to have originated within the limits of the parish, a point not necessary to be settled in the present case. The contract is stated to have been made at the bayou St. John, a place known to be within the boundaries of the parish, which is in our opinion an allegation sufficiently setting forth the jurisdiction of the court, according to a fair construction of the law, allowing it to be necessary.

In relation to the security on the appeal, we are of opinion that the spirit and meaning of the law have been complied with.

Eas'n District. March 1817.

DELESDERNIER vs. GAUDET.

We now come to the two questions which relate to the merits of the cause.

As to the first, we answer briefly that as the plaintiff founds his action on the original contract, and his fair title to the note is supported by evidence, it was properly admitted as evidence of his claim.

In relation to the second, altho' the full amount adjudged to the plaintiff does not appear to be proven to have been received by the defendant, yet as it is shown that the schooner performed several voyages to the amount adjudged not accounted for by the defendant, the acting partner, we do not think that the judgment of the parish court ought on that account to be disturbed.

It is therefore ordered, adjudged and decreed that it be affirmed with costs.

Ellery for the plaintiff, *Henren*, for the defendant.

East'n District. March 1817.

CLAGUE & AL. vs. LEWIS & AL.

Appeal from the court of the first district.

CLAGUE & AL. vs. LEWIS & AL.

When the creditors of a ceding debtor refuse to accept the cession, & allege fraud, he cannot dismiss his petition.

MARTIN, J. delivered the opinion of the court. Lewis, a partner of Lee, in his absence, obtained a meeting of the creditors of the firm, to deliberate on its affairs. Previous to the meeting, some of the creditors suggested their apprehension of his withdrawing with the effects of the firm and held him to security; at the same time the court appointed provisional syndics.

At the meeting, he made a cession of the goods of the firm and prayed for his discharge. A great majority of the creditors, both in number and amount, refused to accept the cession and to grant a discharge.

He prayed for the homologation of the proceedings, and a great number of the creditors joined in a suggestion of fraud and opposed the homologation. A jury was empannelled to try the question of fraud: they could not agree and were discharged by consent. Lewis then prayed and had leave to discontinue his suit. The creditors, several weeks after, prayed for the reinstating of the suit, which the judge declined. They appealed from the judgment of discontinuance.

East'n. District. March 1817.

Claiborne & al. vs. Lewis & al.

The whole record is brought up and Lewis insists on his right to discontinue. His counsel relies on *Partida* 5, 15, 2. 4 *Febrero judicios*, 25. *ff de cessione bonorum* 42, 3. *Curia Philipica* 198, 19, *Partida* 6, 2 29.

The fifth partida provides that if a ceding creditor says that he wishes to recover his goods, before they are sold, and pay his creditors or contest their claims, *they are not to be sold and he is to be heard.*

This does not establish clearly any right in him to withdraw his suit and resume his goods: on the contrary it implies that the suit ought to be *continued*, since he is to be *heard*. The authority seems to provide for the *suspension of the sale*, till the judgment pronounces on his application, which consequently cannot be considered as a matter of absolute right.

Febrero says the ceding debtor may repent, pursue his rights against his creditors, liquidate their several claims and prevent the sale of his goods: but this, he says, is where the cause is *entire*; which is when the creditors *do not accept* and do not present themselves; but not after the contestation, if they oppose him, unless he pays them.

Qui bona cedit, ante rerum venditionem, utique bonis non caret; quare si paratus fuerit se

defendere, bona ejus non veneunt, say the pandects: *qui pœnitet bona cessisse, potest se defendere et consequi ne bona ejus veneant.*

The author of *Curia Philipica* tells us, like Febrero, that the ceding debtor may repent and pursue his actions: *provided the thing be entire*, and that the thing is entire, before the cession is accepted by the creditors and the concourse formed.

The sixth partida cited applies to the general right of plaintiffs to discontinue.

In procedings, on a cession of goods, it is not clear that the debtor, tho' he be considered as the petitioner is absolutely so and entitled to all the advantages of a plaintiff. He is but *quasi* a plaintiff. Febrero considers him as a defendant, *como reo que es aunque parece actor.*

Our legislature has provided that creditors may refuse a surrender in case of fraud. *Civil Code*, 294. *article* 71. The suggestion of fraud, on which this right is bottomed, must regularly be made *before*, since the object of it is to decline, *an acceptance.*

In this case there was a suggestion of fraud, and issue was joined *fraus vel non.* There was therefore a complete *contestatio litis.* The proceedings thereby passed out of that state of *entirety*, during which the debtor might repent and de-

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mand to be dismissed. If it were otherwise, he might for ever keep his creditors at bay. For when could the matter be brought to a close? After dismissing his application to be admitted to a cession, the debtor would renew it as soon as the creditors would press him; and where fraud was again suggested, would it not be the debtor's game to repent again? Then would not the creditors be compelled to relinquish the pursuit or submit to an acceptance and abandon the suggestion of fraud?

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the suit be remanded, with directions to the judge to proceed to trial and judgment, and that the appellee pay costs.

Duncan for the plaintiffs, *Grymes* for the defendants.

GENERAL RULE.

When the appellant does not rely (wholly or in part) on a statement of facts, bill of exceptions or special verdict, but expects to shew error on the face of the record, he shall file an assignment of errors, within ten days after the record is brought up, otherwise the appeal will be dismissed.